IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN
S.B. Criminal Appeal No.563/2006

Saleem Mohammad S/o Ramjan Mohammad
...Accused-Appellant
Versus
Union of India through the Inspector,
Central Narcotics Bureau, Jaipur
...Respondent

Date of Judgment :::: 22nd of January, 2007

PRESENT
Hon'ble Mr. Justice Narendra Kumar Jain

Shri N.A. Naqvi, Counsel for accused-appellant
Shri Rajendra Singh Tanwar, Amicus Curiae
Shri Sushil Sharma, for the Union of India through the Inspector, Central Narcotics Bureau, Jaipur

####

//Reportable//

By the Court:-

This appeal under Section 374 (2) of the Code of Criminal Procedure, on behalf of accused Saleem Mohammad S/o Ramjan Mohammad, is directed against the judgment and order dated 4th of April, 2006 passed by the Special Judge (Sessions Judge), N.D.P.S. Act Cases, Bharatpur, in Special Case No.36/2001, whereby the learned trial court convicted and sentenced the accused-appellant under Section 8/20 of the Narcotic Drugs and Psychotropic Substances Act, 1985

(hereinafter shall be referred to as 'the Act') to ten years rigorous imprisonment and a fine of rupees one lakh; in default of payment of fine, to further undergo ten months simple imprisonment.

The charge against the appellant was that on 4.11.2000 at 6.30 P.M., during his search at the Central Bus Stand, Bharatpur, two kilogram charas was recovered from his possession, which is punishable under Section 8/20 of the Act. The prosecution examined six witnesses and exhibited 22 documents. Thereafter statement of the accused was recorded under Section 313 Cr.P.C., wherein he stated of his false implication in the present case. No evidence was adduced on behalf of the accused.

The learned trial court, after considering the oral and documentary evidence on the record and the submissions of both the parties, convicted and sentenced the accused-appellant, as mentioned above.

The learned counsel for the appellant raised three-fold contentions.

The first contention is that there is violation

of sub-section (2) of Section 42 of the Act, as in the present matter the information recorded under sub-section (1) of Section 42 was not forwarded by concerned officer to his immediate official superior and this provision, being mandatory in nature, the entire proceedings are liable to be quashed.

The second contention is that two samples of 25 grams each of contraband were taken and seized where the weigh of sample reached at laboratory was 27 grams, therefore, there is variance in the quantity of sample which was taken and sealed and the quantity of sample which was received at the Forensic Science Laboratory (for short, 'the FSL') and this variance creates doubt that the sample which was seized and sent was really received by FSL and the accused is entitled to the benefit of this doubt.

The third contention is that the sample was taken on 4th of October, 2000, and the same was sealed immediately at Bharatpur but the same was not sent to the FSL for analysis till 6th of October, 2000, which creates serious doubt on the prosecution case and further that the seal, which was used in the present case, was handed-over to PW-4 Ajay Kumar, vide Exhibit P-13, but Ajay Kumar, during the course of his

examination, did not support the prosecution case and stated that his signatures were obtained on blank papers and no such seal was given to him, therefore, the prosecution has failed to prove the guilt against the appellant beyond reasonable doubt and the learned trial court has committed a serious illegality in convicting and sentencing the accused-appellant.

In support of the contentions, the learned counsel for the appellant referred the decisions in the following cases:-

1. Raju Munim S/o Heera Lal Vs. The State of Rajasthan (2006 (3) WLC (Raj.) 392);

2. Rajesh Jagdamba Avasthi Vs. State of Goa, (2005) 9 SCC 773;

3. Riyaz Mohammad @ Pappu Vs. State of Rajasthan 2001 (1) R.C.C. 326;

4. State of Rajasthan Vs. Gurmail Singh – AIR 2005 SC 1578

Learned counsel appearing on behalf of the Union of India contended that all the submissions made on behalf of the accused-appellant are not tenable in the eye of law. He supported the judgment and order

passed by the learned trial court. In support of his contentions, the learned counsel for the respondent UOI relied upon the decisions in the following cases:-

1. G. Srinivas Goud Vs. State of Andhra Pradesh – 2005 (6) Supreme 623;

2. Shankar Lal & Parthu Vs. State of Rajasthan – 2002 (1) R.C.C. 83

3. Bhanwar Singh Vs. Union of India - 2006 (4) WLC (Raj.) 425

4. Kalyan Vs. State of Rajasthan – 2006 (3) WLC (Raj.) 583

I have considered the submissions urged on behalf of both the parties and minutely scanned the impugned judgment as well as the record of the trial court.

In Raju Munim's case (supra) the effect of variance in the weight of the sample seized and the sample received by the FSL was considered on the basis of the principles laid down by the Hon'ble Supreme Court in Rajesh Jagdamba Avasthi's case, and it was held that in absence of satisfactory explanation by the prosecution in this regard the case becomes

doubtful.

In Rajesh Jagdamba Avasthi's case (supra) the Hon'ble Supreme Court considered the effect where weight of sample was less than the seized quantity and held that prosecution failed to explain this discrepancy and, in such circumstances, the conviction cannot be upheld. The Hon'ble Supreme Court observed as under:-

> “We do not find it possible to uphold this finding of the High Court. The appellant was charged of having been found in possession of charas weighing 180.70 gm. The charas recovered from him was packed and sealed in two envelopes. When the said envelopes were opened in the laboratory by the junior scientific Officer, PW 1, he found the quantity to be different. While in one envelope the difference was only minimal, in the other the difference in weight was significant. The High Court itself found that it could not be described as a mere minor discrepancy. Learned counsel rightly submitted before us that the High Court was not justified in upholding the conviction of the appellant on the basis of what was recovered only from envelope A ignoring the quantity of charas found in envelope B. This is because there was only one search and

> seizure, and whatever was recovered from the appellant was packed in two envelopes. The credibility of the recovery proceeding is considerably eroded if it is found that the quantity actually found by PW 1 was less than the quantity sealed and sent to him. As he rightly emphasized, the question was not how much was seized, but whether there was an actual seizure, and whether what was seized was really sent for chemical analysis to PW 1. The prosecution has not been able to explain this discrepancy and, therefore, it renders the case of the prosecution doubtful."

In Bhanwar Singh's case (supra) this Court considered the effect of variance in the weight of sample seized and weight of sample received by FSL and in the facts and circumstances of that case a finding was recorded that from the evidence it is clear that the seal on the samples till it reached to the Government Opium and Alkaloid Works, Neemuch (M.P.), it remained intact and relying upon the judgment of the Hon'ble Supreme Court in Madan Lal & Another Vs. State of Himachal Pradesh – 2003 Cr.L.R. 3868 (SC), the contention of the learned counsel for the accused regarding reduction in weight vitiating the trial was not accepted. Para Nos.17 and 21 of the judgment are

reproduced as under:-

> “17. In Madan Lal & Another Vs. State of Himachal Pradesh (Supra), the Hon'ble Supreme Court held as under:-
>
> “Coming to the plea that there was reduction in weight of the samples sent for analysis and there was tampering, it has to be noted that this aspect has also been considered by the trial Court which has recorded the reasons for rejecting the same. It has been noted that the seals were intact and there was no tampering. The view has been endorsed by the High Court. On considering the reasoning indicated that there was very minimal and almost ignorable variation in weight, we find no reason to interfere with the findings.”
>
> 21. In the instant case the appellant has not challenged the report of Government Opium Alkaloid Works, Neemuch Ex.P-34 before the trial court. Further, PW-6 Jameel Ahmed who carried the samples to the Government Opium Alkaloid Works, Neemuch has proved that the seal on the samples remained intact till it reached to Government Opium Alkaloid Works, Neemuch and his testimony has not been shaken in the cross-examination. The report of Government Opium Alkaloid Works, Neemuch Ex.P-34 clearly reveals that it received two sealed paper

> packets through PW-6 Jameel Ahmed, the seals were intact and tallied with specimen of seal forwarded to it and therefore, it is clear that the seals on the samples remained intact till it reached to Government Opium Alkaloid Works, Neemuch and thus, in view of the aforesaid decisions of Hon'ble Supreme Court, the contention of the learned counsel for the appellant regarding reduction in weight vitiating the trial cannot be accepted."

In Kalyan Vs. State of Rajasthan (supra) this Court considered the effect and explanation of variance in weight of sample seized and weight of sample received by FSL and in the facts and circumstances of that particular case it was found that the explanation given by the prosecution is satisfactory.

In the State of Rajasthan Vs. Gurmail Singh (supra), in the facts and circumstances of that particular case, the Hon'ble Apex Court held that there is no evidence to prove satisfactorily that seals found were in fact the same seals as were put on the sample bottles immediately after the seizure of the contraband.

In Shankar Lal & Parthu Vs. State of Rajasthan (supra) the effect of variance in weight was considered and it was held that the slight difference in weight of sample would not make any difference.

In G. Srinivas Goud's case (supra) the Hon'ble Apex Court considered the provisions of sub-section (2) of Section 42 of the Act and held that the requirement of informing the immediate official superior under Section 42 (2), has to be confined to cases where the action is without authorization by officers below the rank of Gazetted Officer without authorization.

In Riyaz Mohammad @ Pappu Vs. State of Rajasthan (supra) this Court, in the facts and circumstances of that case, held that the prosecution failed to establish that the seal, on the samples of the seized smack, remained intact from the date of its seizure till it reached the FSL and gave the benefit of doubt and acquitted the accused.

So far as the first contention of the learned counsel for the appellant about violation of sub-

section (2) of Section 42 of the Act is concerned, the same is not tenable in view of the evidence available on the record and the law laid down by the Hon'ble Supreme Court in G. Srinivas Goud's case (supra). The information (Exhibit P-1) in the present case was recorded by PW-1 Vijay Singh Meena, the Superintendent, (Preventive), Central Bureau of Narcotics, Jaipur. PW-1 was a Gazetted Officer, which is clear from his cross-examination, wherein he stated that he went with raiding-party, being a Gazetted Officer. The learned counsel for the appellant, Shri N.A. Naqvi, has also not disputed this fact that PW-1 Vijay Singh Meena, the Superintendent, was a Gazetted Officer.

In G. Srinivas Goud's case (supra), the Hon'ble Supreme Court held that if an information has been taken down by a Gazetted Officer then it is not necessary to send a copy thereof to his immediate official superior. Para Nos.8, 9 and 10 of the judgment are reproduced as under:-

> “8. The question for our consideration is: whether it is necessary for officers of the gazetted rank to comply with sub-section (2) of Section 42, i.e. send the

information taken down in writing by the officers to immediate official superior within seventy two hours? According to the learned counsel for the appellants Section 42(2) is mandatory and covers all officers including officers of gazetted rank. It does not make any distinction between a gazetted and a non-gazetted officer and, therefore, all empowered officers must comply with sub-section (2) of Section 42.

9. It will be seen from Section 41(2) that it refers to only officers of gazetted rank and it is such officers who can authorize their subordinates, not below the rank of peon, sepoy or constable, to carry out arrest, search or seizure. The function of arrest, search and seizure carried out under Section 42(1) is by officers who do not have warrants or authorization in their hands before proceeding to take action. This is as per the heading of the Section which reads: “Power of entry, search, seizure and arrest without warrant or authorization”. Under Section 41 it is the specified Magistrates who issue warrants of arrest and it is officers of gazetted rank who give authorization in favour of their juniors. Provisions of sub-section (2) of Section 42 are meant to cover cases falling under Section 42(1). Therefore, in our view, the requirement under Section 42

(2) need not to be extended to cases of arrest, search and seizure by officers of gazetted rank. The officer of gazetted rank while authorising junior officers under Section 41(2) knows what he is requiring them to do and, therefore, there is no need for reporting. For this reason Section 41 does not contain any such requirement. The need for reporting under Section 42(2) arises because the officer proceeds without authorisation in terms of Section 41(1) or 41(2). The requirement of informing the immediate official superior under Section 42(2), in our view, has to be confined to cases where the action is without authorisation by officers below the rank of gazetted officers without authorization.

10. It will be anomalous to say that officers of gazetted rank who are conferred with power to authorise junior officers to carry out arrest, search and seizure, are required to report to their superior officers when they carry out arrest, search or seizure on their own. As already seen the rationale for this provision of informing superiors appears to be that when the arrest, search and seizure is without authorization by gazetted rank officers, the officers taking action must keep their superiors informed. The superior officers must know about the action taken by

> their subordinates. However, the position of gazetted rank officers, in view of their rank and seniority and power to authorise subordinates to proceed to action, is totally different. They are the source of power of authorization. The gazetted rank officers enjoy special position and privileges under the Act. They need not be equated to officers taking action without authorization or warrants. The requirement of sending information to superior officers under sub-section (2) of Section 42 cannot be insisted upon in their case. There is no bar in the statute to functions of arrest, search and seizure being carried out by the officers of the gazetted rank themselves. When they act on their own, they do not have to report to their seniors on such things."

In view of interpretation of sub-section (2) of Section 42 in the above referred judgment of the Hon'ble Supreme Court, the first contention of the learned counsel for the appellant about violation of sub-section (2) of Section 42 of the Act, in the present case, cannot be accepted.

The another contention of the learned counsel for the appellant about benefit of doubt because of variance in the weight of the sample at the time of its seizure and receipt thereof at FSL, is also not

acceptable in the facts and circumstances of the present case. Exhibit P-4 is the seizure memo wherein it is mentioned that two kilogram charas was recovered from the possession of the appellant and, out of it, two samples, weighing 25 grams each, were taken and sealed. Exhibit P-12 is the analysis-report on the contraband sample wherein it is mentioned that net weight of sample received in Lab was 27 grams, therefore, there appears variance of two grams. In this connection it is relevant to mention that in the analysis-report (Exhibit P-12) given by the Government Opium and Alkaloid Works, Neemuch, it was specifically mentioned that one sealed envelope, marked A-1, was received by the registered-post-parcel. Seals on the packet were found intact and tallied with facsimile of the seal forwarded. The report Exhibit P-12 is duly signed by J.M. Pamecha, the Assistant Chemical Examiner. Exhibit P-8 is the sample of seal, which was put on the sample of contraband seized. The sample was seized on 4th of October, 2000, and the same was forwarded vide letter Exhibit P-15 dated 6th of October, 2000, to the General Manager, Government Opium and Alkaloid Works, Neemuch, by PW-1 Vijay Singh Meena, the Superintendent, through registered-post. The original postal-receipt is affixed on the letter

Exhibit P-15. Exhibit P-12, the report of public-analyst, has been proved by PW-3 J.M. Pamecha, the Assistant Chemical Examiner. PW-3, in his statement, has stated that he has received sample in sealed envelope and he found the seals on the packet intact and tallied with the facsimile of the seal forwarded. In cross-examination, the PW-3 has admitted that the weight of sample was 27 grams, but there was no cross-examination on the point whether the sample was received in sealed-cover or not, and the same was found intact and tallied with facsimile of the seal forwarded.

This Court in Bhanwar Singh's case (supra), considered the judgment of the Hon'ble Supreme Court in Madan Lal & Another Vs. State of Himachal Pradesh (supra) and observed that seals were intact and there was no tampering therewith, and held that the variance was ignorable, hence did not accept the contention of the accused in this regard. In Shankar Lal & Parthu Vs. State of Rajasthan (supra), the weight of sample at the time of seizure was 30 grams, whereas at the time of receipt of it in FSL, it was 24 grams, but, after considering all the facts and circumstances of the case, the Court came to a conclusion that it

cannot be held that the samples were tampered with and accused-persons are entitled to the benefit of doubt.

So far as present case is concerned, there is variance of two grams, but from the report Exhibit P-12 and the statement of PW-3, it is clear that the samples were received intact and there was no tampering with it and nothing could come from the cross-examination of PW-3, the Assistant Chemical Examiner. Therefore, I find that the variance in the present case in the sample seized and sample received by FSL is ignorable and accused-appellant is not entitled to the benefit of doubt.

The last contention of the learned counsel for the appellant about delay in sending the sample for analysis and handing-over the seal to independent person are also not tenable in the facts and circumstances of the present case. It is contended that the samples were taken on 4th of October, 2000, and the same were not forwarded immediately but they were forwarded on 6th of October, 2000. Exhibit P-4 shows that seizure took place on 4th of October, 2000 at 8.00 PM, therefore, it was not possible to send the same on 4th of October, 2000. The compliance of other

provisions of the Act was also required to be fulfilled in the matter and the sample was sent for analysis on 6th of October, 2000. I find that there was no delay in sending the samples for analysis and the said delay of one day is not fatal to the prosecution case and the accused cannot be said to be entitled to get the benefit out of it.

So far as handing over of the seal used is concerned, Exhibit P-13 shows that the seal, which was used, was handed-over to Ajay Kumar S/o Kedar Prasad. It is true that PW-4 Ajay Kumar has been declared hostile, but, in his cross-examination, he has admitted his signatures on Exhibit P-13. PW-4 in his statement, has stated that his signatures were obtained on blank papers and no seal was given to him, whereas the other prosecution witnesses have stated that the seal, which was used in the case, was given to PW-4 Ajay Kumar and his signatures is there on Exhibit P-13, wherein it is written that he received the seal. The other prosecution witnesses were also examined and from close scrutiny of their statements I find their evidence trustworthy in this regard. The Hon'ble Supreme Court in G. Srinivas Goud's case (supra) has held that accused can be convicted on sole

testimony of Government officials' evidence, if their testimony is trustworthy, therefore, even if PW-4 Ajay Kumar has been declared hostile then only on this ground alone the other prosecution evidence cannot be discarded and accused-appellant cannot be given the benefit of doubt.

In view of above discussion, I do not find any merit in this appeal and the same is accordingly dismissed.

(Narendra Kumar Jain) J.

//Jaiman//